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No. 92-1189

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et. al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL MARITIME HISTORICAL SOCIETY IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NATIONAL MARTIME HISTORICAL SOCIETY IN SUPPORT OF PETITIONER

The National Maritime Historical Society hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

The National Maritime Historical Society was founded in 1963 and currently has more than 12,500 members.

The objective of the National Maritime Historical Society is to educate and challenge people by increasing their awareness and appreciation of our maritime heritage. The Society believes that understanding our past, including our maritime history, is vital to meeting the problems of the present and preparing for the challenges of the future.

The Society is vitally concerned about the destructive impact that the decision below will have upon the preservation of our maritime history. Conservation of our country's historical and cultural heritage is vital not only for the current generations of Americans, but for future generations, as well. Because America is a melting pot of many cultures, its history is particularly diverse and serves as one of our common links to the past.

Upon a finding of abandonment, the maritime law of finds acts to protect the totality of interests in historic shipwrecks. Conversely, the law of commercial salvage imposes no such duty, and encourages salvors and other claimants to carve shipwrecks up into sections, thereby destroying all of the irreplaceable information that can be gleaned from studying shipwrecks as a whole. *See* Nicholas J.J. Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990*, 16 Tul. Mar. L.J. 1 (1992). If, as the Fourth Circuit held, abandonment cannot be inferred as a fact from circumstantial evidence, we risk losing forever a window into the past and the opportunity to study and share our rich cultural heritage.

Equally important, the new rule established by the decision below will encourage concealment, and perhaps outright destruction, of historical information by finders of long-lost shipwrecks. Much of this information is irreplaceable, and could well be lost to all generations to come.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

Respectfully submitted,

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February 16, 1993

QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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BRIEF AMICUS CURIAE OF THE NATIONAL MARITIME HISTORICAL SOCIETY IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The National Maritime Historical Society was founded in 1963 and currently has more than 12,500 members. The objective of the National Maritime Historical Society is to educate and challenge people by increasing their awareness and appreciation of our maritime heritage. Fundamentally, the Society believes that understanding our past, including our maritime history, is vital to meeting the problems of the present and preparing for the challenges of the future. Hence, the Society seeks to foster and promote maritime knowledge through a broad spectrum of educational programs in sea history, including programs sponsored at museums, secondary schools, and universities, regarding historic ship preservation,

ship building, seamanship, marine art, and literature of the sea. The Society also maintains a national library and biographical archives, publishes a number of educational materials, serves as a clearinghouse for information on historic shipwrecks, and raises funds to help save and restore certain ships.

The Society believes that if the Fourth Circuit's decision is allowed to stand, it could effectively end, and certainly will impede, the type of responsible recovery of historic shipwrecks undertaken by Columbus-America Discovery Group. Because of its concern over the destructive impact the decision below will have upon the preservation of our maritime history, the National Maritime Historical Society respectfully requests that the Court grant review.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND STATE SUPREME COURTS ON WHETHER ADMIRALTY COURTS MAY FIND ABANDONMENT OF LONG-LOST SHIPWRECKS BASED ON CIRCUMSTANTIAL EVIDENCE

The maritime law of finds applies "in extraordinary cases, . . . where the property has been lost or abandoned for a *very long* period." *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981) (emphasis added). Affirmative abandonment, while sufficient to satisfy the maritime law of finds, is not a requirement. *See Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059 (1st Cir. 1987).

The maritime law of finds is particularly applicable to the special category of long-lost historic wrecks and treasure salvage. *See Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d

330 (5th Cir. 1978). The maritime law of finds has become the overwhelming law of the land for adjudicating rights to long-lost wrecks. The circuit courts of appeal are in conflict on the issue. *See, e.g., Martha's Vineyard*, 833 F.2d 1059; *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985). The overwhelming majority of district courts recognize the maritime law of finds. *See, e.g., MDM Salvage, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 631 F. Supp. 308 (S.D. Fla. 1986); *Indian River Recovery Co. v. The China*, 645 F. Supp. 141 (D. Del. 1986); *Commonwealth v. Maritime Underwater Surveys, Inc.*, 1987 A.M.C. 2590 (Mass. 1987), *aff'd*, 1989 A.M.C. 425 (Mass. 1988); *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1982); *Platoro Limited, Inc. v. Unidentified Remains of a Vessel*, 518 F. Supp. 816 (W.D. Tex. 1981), *aff'd in part, vacated in part*, 695 F.2d 893 (5th Cir. 1983); *Chance v. Certain Artifacts Found and Salvaged*, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd without opinion*, 775 F.2d 302 (11th Cir. 1985).

Historically, state courts have also held that title may be divested from past owners of shipwrecks by inferring abandonment after the passage of 40 years or less. *See, e.g., Eads v. Brazleton*, 22 Ark. 499 (1861) (28 years—"undoubtedly abandoned"); *Deklyn v. Davis*, 1 Hopk. Ch. 135 (N.Y. Ch. 1824) (40 years—"abandoned and derelict"); *Creevy v. Breedlove*, 12 La. Ann. 745 (1857) (23 years—"clearly derelict"); *State v. Massachusetts Co.*, 95 So.2d 902 (Fla. 1956) (en banc), *cert. denied*, 355 U.S. 881 (1956) (34 years—"wrecked and derelict"). The substantial weight of authority rejects claims of original owners eroded by time, non-use, or other circumstances. *See, e.g., Wyman v. Hulburt*, 12 Ohio 81 (1843) (finder awarded title over undisputed original owner of cargo); *Steinbraker v. Crouse*, 169 Md. 453 (1936) (assignee of company's rights in 169 vessels that sank in a bay adjacent to its property lost title to new finders/

salvors of scrap off the vessels); *Howard v. Sharlin*, 61 So.2d 181 (Fla. 1952) (finder of lead keel in schooner prevails over putative owner because schooner was "derelict"). *See also United States v. Smiley*, 27 F. Cas. 1132 (C.C.N.D. Cal. 1864) (No. 16,317); *Thompson v. United States*, 62 Ct. Cl. 516 (1926); *Creevy v. Breedlove*, 12 La. Ann. 745 (1957); *Deklyn v. Davis*, 1 Hopk. Ch. 135 (N.Y. Ch. 1824).

Intertemporal legal analysis is particularly instructive in determining nineteenth century legal and business practices regarding title to items lost at sea. *Eads v. Brazleton* is a typical case from the era of the *S.S. Central America*. In awarding the wreck of the steamboat *America* to the finder after apparent abandonment for 28 years, the court stated: "in extreme cases property wholly derelict and abandoned has been held to belong to the finder against the former owner." 22 Ark. at 509. *See also State v. Massachusetts Co.*, 95 So.2d at 905 (summarizing ancient law). Today in the United States, there is a presumption, under 33 U.S.C. § 414, that a sunken vessel is abandoned if not removed from a navigable channel within 30 days.

United States v. Smiley is also instructive. When one of the *S.S. Central America's* sister ships, the *Golden Gate*, sank in 1862, the California court determined that the ship and its cargo—which had included over $1,000,000 in gold—was abandoned after less than two years. 27 F. Cas. at 1134.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE CONSERVATION OF OUR NATION'S HISTORICAL AND CULTURAL HERITAGE, INCLUDING DETERMINATION OF TITLE TO LONG-LOST AND ABANDONED SHIPWRECKS, IS AN IMPORTANT NATIONAL QUESTION

A. Congress and the President Have Expressed the National Policy of Conserving Historical and Cultural Materials, Including Shipwrecks and Sunken Cultural Deposits

Conservation of our country's historical and cultural heritage is vital not only for the current generations of Americans, but for future generations, as well. Because America is a melting pot of many cultures, its history is particularly diverse and serves as one of our common links to the past.

Because of the importance of preserving our country's rich cultural and historical heritage, Congress passed the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, in 1966. The Act establishes the policy of the United States of supporting the preservation of historical resources through a cooperative effort of federal, state, and local governments, and, contributing to "the preservation of nonfederally owned prehistoric and historical resources and giv[ing] maximum encouragement to organizations and individuals undertaking preservation by private means." 16 U.S.C. § 470-1(4). Congress' efforts to protect historic resources stem from the understanding that "preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans." 16 U.S.C. § 470(b)(4).

In 1971, President Nixon reiterated this country's commitment to preserving our historical and cultural past by issuing an executive order calling for the federal government to restore and maintain federally owned objects of

historical, architectural, or archaeological significance, and to ensure that federal programs contribute to the preservation of non-federally owned sites, structures, and objects. Exec. Order No. 11593, 36 Fed. Reg. 8921 (1971). The Executive Order also directs the federal government to take a leadership role in maintaining our country's historical and cultural heritage to ensure its preservation for future generations. *Id.*

The national policy of protecting historical and cultural resources extends to underwater sites. For example, Congress passed, and President Reagan signed into law, the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101 *et seq.*, because of the importance of long-lost and abandoned shipwrecks to the historical and cultural heritage of the United States. The Act recognizes the need to "allow for the appropriate public and private sector recovery of shipwrecks consistent with the historical values and environmental integrity of the shipwrecks and the sites." 43 U.S.C. § 2103(a).

This national policy of protecting long-lost and abandoned shipwrecks, and other underwater cultural deposits, has been expressed, at various times, in other forms. *See, e.g.*, The Marine Sanctuaries Act, 16 U.S.C. § 1431 *et seq.* (1988) (amended 1992) (allowing the federal government to designate an area of the marine environment as a sanctuary based, *inter alia*, on the "historical, cultural, archaeological or paleontological significance" of the site involved. 16 U.S.C. § 1433(b)(1)(B)).

B. The States Have Expressed the National Policy of Conserving Historical and Cultural Materials, Including Shipwrecks and Sunken Cultural Deposits

Even before the passage of the Abandoned Shipwreck Act, most states and territories had recognized the national public policy of conserving underwater cultural resources, such as long-lost and abandoned shipwrecks. In fact, 27 states had already enacted historic preservation statutes pertaining to abandoned shipwrecks or

underwater historical property. H.R. Rep. No. 514(I), 100th Cong., 2nd Sess. 1, 2, *reprinted in* 1988 U.S.C.C.A.N. 365, 366. While these states' statutes pre-dated the Abandoned Shipwreck Act, they were directed to similar concerns.

Like federal efforts, state programs have been directed toward the responsible recovery and conservation of items from the sea. Of similar importance have been concerns over the protracted and costly litigation spawned over confusion in the law governing abandoned shipwrecks. Yet, these same concerns are now effectively reinstated by the decision below.

C. The Issue of Whether Admiralty Courts May Continue to Infer Abandonment of Long-Lost Shipwrecks is Important to the National Policy of Conserving Our Historical and Cultural Heritage

The issue of when long-lost shipwrecks are effectively abandoned is a question of first impression for the Court, on which the circuits are in conflict. Although the question of what rights accrue to a finder or salvor upon locating a shipwreck can be traced back to Rhodian and Roman maritime law, *see* M. Norris, 3A *Benedict on Admiralty: The Law of Salvage* § 1, at 4-7 (1958 & Supp. 1974), the modern development of the law and refinement of maritime technology in the post-World War II era. We are thus at the crossroads requiring the Court's attention to this case.

Upon a finding of abandonment, the maritime law of finds acts to protect the totality of interests in historic shipwrecks. The law of finds maintains the integrity of shipwrecks, with title in a single owner, and, further, requires those who recover long-lost items, to preserve their discoveries in a manner so as to maximize the historical and scientific value of the recovery. *Columbus-America Discovery Group v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 1989 A.M.C. 1955, 1958 (E.D.

Va. 1989). Conversely, the law of commercial salvage imposes no such duty,[1] and encourages salvors and other claimants to carve shipwrecks up into sections owned by a number of different interests, thereby destroying all of the irreplaceable information that can be gleaned from studying shipwrecks as a unified whole. *See* Nicholas J.J. Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990*, 16 Tul. Mar. L.J. 1 (1992).

Thus, the determination of when a shipwreck is abandoned affects both preservation under the Abandoned Shipwreck Act and whether the commercial law of salvage or the law of finds will apply to long-lost shipwrecks; and these issues, in turn, are especially important in the context of historic preservation. If, as the Fourth Circuit held, abandonment cannot be inferred as a fact from circumstantial evidence (including, as here, the passage of approximately 130 years during which the insurance claimants did nothing but destroy any documents evidencing an interest), we risk losing forever a window into the past and the opportunity to study and share our rich cultural heritage. Much of this information is irreplaceable, and now could be lost to all generations to come. Accordingly, the issue affects literally millions of Americans, living and unborn, and warrants the Court's attention.

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[1] While the Fourth Circuit suggested that the law of salvage should be changed to entitle salvors to a larger salvage award for preserving "the historical and archaeological value of the wreck and the items salved," *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, 468 (1992), it imposed no duty on salvors to take such steps. Instead, it created an incentive for finders to conceal their finds, much as grave robbers did to ancient Egyptian pyramids, because it makes it virtually impossible for them to acquire legitimate control over their discoveries.

III. ADMIRALTY COURTS SHOULD BE PERMITTED TO CONTINUE TO INFER ABANDONMENT OF LONG-LOST SHIPWRECKS BASED ON CIRCUMSTANTIAL EVIDENCE

There are overwhelming policy reasons for allowing admiralty courts to continue to infer abandonment based on circumstantial evidence. For example, application of the law of finds achieves certainty and predictability of legal rights. As time passes, memories fade, claims become stale, witnesses are lost, and the chances of mistake, or even fraud, become great. The corresponding need for repose increases. Expending resources in litigation over title, when such resources could be better spent on historic preservation and scientific study, is wasteful and will burden our court system and historical preservation efforts for years to come.

Equally important, the new rule established by the decision below will encourage concealment, and perhaps outright destruction, of historical information by finders of long-lost shipwrecks. Yet, on the contrary, the law should encourage investigation and preservation of information about historic shipwrecks, consistent with our national policy. Those who find shipwrecks should have every incentive to act openly, and to strive to determine as much as possible about the shipwrecks. The Fourth Circuit's opinion provides precisely the opposite incentive. By according a presumption of ageless vitality to ownership interests, the decision below discourages finders from investigating conditions, items, and structures at wreck sites that may link a particular recovered artifact with a specific long-gone crew member, cargo interest, or passenger. In effect, the finder has a disincentive to develop historical information that might shed valuable light into the provenance and history of the shipwreck.

CONCLUSION

For these reasons, as well as those stated in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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